MOTION FILED
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No. 03-814

In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE SURREPLY BRIEF AND SURREPLY BRIEF OF RESPONDENT DUTRA CONSTRUCTION CO.

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MOTION OF RESPONDENT DUTRA CONSTRUCTION CO. FOR LEAVE TO FILE SURREPLY BRIEF

The Respondent Dutra Construction Co. hereby requests leave to file the accompanying surreply brief. In support of this Motion, Dutra states as follows:

1. In his reply brief, relying in part on an inadvertently mistaken statement in Dutra's original brief, the Petitioner suggests that an argument in Dutra's brief is invalid.

2. In fact, as the accompanying surreply explains, the Petitioner's point not only does not diminish Dutra's argument, the argument applies with even *more* force.

3. The accompanying surreply is very brief and will assist the Court. Its filing will not prejudice the Petitioner.

4. In the circumstances, a brief surreply is in order so that Dutra can respond to the Petitioner's charge and set the record straight.

For the foregoing reasons, Dutra respectfully requests leave to file the accompanying surreply brief.

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INTRODUCTION

The Petitioner's Reply brief does not directly respond to the substance of the Respondent Dutra Construction Company's brief, but does attempt to question a few peripheral aspects of Dutra's arguments. One such peripheral matter is Dutra's inadvertent error in saying that a definition added to the Longshore and Harbor Workers Compensation Act ("LHWCA") in 1972 was part of the LHWCA when it was enacted in 1927. The Petitioner wrongly suggests that this invalidates Dutra's substantive point. In fact, the Petitioner's reply on this issue misses the larger truth of Congress's intent as to the meaning of the term "vessel."

ARGUMENT

In its principal brief, Dutra asserted that the LHWCA, when enacted in 1927, included a definition of the term "vessel" that was unlike the definition appearing in 1 U.S.C. § 3, and that this conflict of definitions indicated that Congress did not wish to follow or endorse section 3's definition when it enacted the LHWCA. (Dutra br. 32) In reply to this point, the Petitioner says two things: First, the LHWCA's definition of the term "vessel" is not, in fact, a definition at all. Second, the definition did not appear in the LHWCA when enacted in 1927, but was added by amendment in 1972, and this somehow undercuts Dutra's basic argument. (Pet. reply br. 4) As to both points the Petitioner is mistaken.

I. THE LHWCA *DOES* DEFINE THE TERM "VESSEL."

The LHWCA includes a section specifically defining twenty-two different terms used in the Act. *See* 33 U.S.C. § 902 ("Definitions"). In pertinent part, section 902 provides:

> When used in this chapter –
>
> * * *
>
> (21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death. . . .

33 U.S.C. § 902(21). Manifestly, this *is* a definition of "vessel." It is the definition that Congress chose. It may not be a model of clarity and detail, and it may not serve the Petitioner's interests in this case, but it is a definition nonetheless, and courts routinely rely on and refer to it as such. *E.g.*, *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530 (1983); *Gravatt v. City of New York*, 226 F.3d 108, 115 (2d Cir. 2000); *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 606 (1st Cir. 1996); *Torres v. Johnson Lines*, 932 F. 2d 748, 749 (9th Cir. 1991); *Trussell v. Litton Sys., Inc.*, 753 F. 2d 366, 367 & notes 3-4 (5th Cir. 1984); *Brown v. Peter Hahn GMBH*, 89 F. Supp. 2d 735, 741 (E.D. Va. 2000); *Dougherty v. Navigazione San Paolo*, 622 F. Supp. 1, 2 (E.D. Pa. 1984).

II. THE LHWCA's 1972 DEFINITION OF "VESSEL" IS FURTHER EVIDENCE THAT CONGRESS DID NOT INTEND TO INCORPORATE 1 U.S.C. § 3's DEFINITION.

The Petitioner correctly notes that, contrary to a statement in Dutra's brief, the definition of "vessel" at 33 U.S.C. § 902(21) was not part of the LHWCA when it was enacted in 1927, but was added to the statute by amendment in 1972. This small point misses the forest for the trees. Notwithstanding that the LHWCA's "vessel" definition first appeared in 1972, Dutra's essential point as to Congressional intent is undiminished: Congress's treatment of the "vessel" concept in relation to the LHWCA is indicative of an implicit decision *not* to incorporate section 3's definition of "vessel." Moreover, the 1972 definition of "vessel" is additional evidence in support of this view.

The Petitioner does not dispute that Congress is accustomed to incorporating 1 U.S.C. § 3's definition and other definitions into legislation where it considers that appropriate and desirable. (*See* Dutra br. 29-30) The "vessel" definition appearing at 1 U.S.C. § 3 is the successor to prior enactments that predated the LHWCA's 1927 promulgation by decades, and presumably were known to Congress. (Pet. br. 16) As such, in 1927, at a time when the "vessel" concept was *far* from established,[1] Congress in

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[1] As the very existence of this case bears witness, for Jones Act purposes, the vessel concept generally and the 1 U.S.C. § 3 definition are not clearly established *now*, and certainly were not in 1927. *See, e.g.*, *Evansville and Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926) (defining vessel differently than section 3); *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 627-630 (1887) (same); David W. Robertson, Steven F. Freidell, and Michael F. Sturley, *Admiralty and Maritime Law in the United States*, 59 (Carolina Acad. Press 2001) (section

(Continued on following page)

enacting the LHWCA let pass the opportunity to restate or incorporate the extant definition of "vessel" that ultimately was codified at 1 U.S.C. § 3. In this way, Congress effectively *rejected* the section 3 definition.

Forty-five years later, Congress amended the LHWCA in part to insert a definition of "vessel." *Again*, Congress did not incorporate section 3's definition. The reasonable implication of that action is that – *directly* contrary to the Petitioner's premise that section 3 supplies a controlling definition of "vessel" – Congress did *not* wish to adopt section 3's definition. That Congress would *twice* eschew section 3's definition in this way makes perfect sense in light of its deletion of a similar definition when enacting the Jones Act (Dutra br. 27-29), this Court's effective rejection of section 3's definition (Dutra br. 33-34), the problematic overbreadth of section 3 (Dutra br. 36-38), and the long-standing practice and general desirability of *judicial* development of the "vessel" concept.

Dutra's point that Congress did not intend to follow section 3 when it enacted the LHWCA in 1927 remains valid. Moreover, the fact that Congress by implication *reaffirmed* its 1927 rejection of section 3 in 1972 when it once again ignored section 3 and created a different

3's definition "has not been very influential. . . . When courts mention [it], it usually seems to be a makeweight argument."); Brief of Amicus Association of Trial Lawyers of America at 7 ("[I]rreconcilable conflict and confusion exist among the various courts that have attempted to define ['vessel']."); Brief of Amicus United Brotherhood of Carpenters and Joiners at 12 ("The lower courts have developed a gaggle of conflicting vessel definitions."); Petitioner's Court of Appeals Brief at 19 ("[T]here is no statute specifically defining [vessel] for the Jones Act.").

"vessel" definition only *strengthens* Dutra's point. The Petitioner is wrong to suggest otherwise.

CONCLUSION

The First Circuit's decision should be affirmed.

Respectfully submitted,

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